

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition of USTelecom for Forbearance Pursuant)	WC Docket No. 18-141
to 47 U.S.C. § 160(c) to Accelerate Investment in)	
Broadband and Next-Generation Networks)	

OPPOSITION OF USTELECOM – THE BROADBAND ASSOCIATION

The Commission should promptly deny INCOMPAS’s “Motion to Dismiss,” because the forbearance petition filed by USTelecom – The Broadband Association (“USTelecom”) is “complete-as-filed.”¹ Consistent with the Commission’s rules, the Petition “explicitly state[s] the scope of the relief requested, address[es] each prong of the statute as it applies to the rules or provisions from which the petitioner seeks relief, identif[ies] any other proceedings pending before the Commission where the petitioner speaks to the relevant issues, and compl[ies] with format requirements.”² The Petition also makes a *prima facie* case for the relief requested. INCOMPAS’s assertion that the Petition nonetheless is not complete-as-filed is based on a misreading of the scope and purpose of the relevant rule, particularly as applied to the confidential information that is the focus of its motion.³

¹ INCOMPAS Motion to Dismiss, WC Docket No. 18-141, at 1 (filed May 11, 2018) (citing 47 C.F.R. § 1.54(b), which addresses the need to state a *prima facie* case) (“INCOMPAS Mot.”). USTelecom does not oppose but otherwise does not address INCOMPAS’s accompanying motion for an extension of the pleading cycle already set by the Commission.

² *United States Telecom Ass’n Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order, 28 FCC Rcd 2605 ¶ 5 n.17 (2013) (“*USTelecom Short Order*”).

³ At the outset, USTelecom notes that INCOMPAS itself deviates from the Commission’s forbearance rules by spurning the appropriate procedural vehicle for the relief it seeks. Parties seeking rejection of a forbearance petition on grounds of incompleteness are required to file a motion for summary denial, which is subject to procedures that include a specific deadline for opposition (*i.e.*, the due date for reply comments) and a prohibition on replies. 47 C.F.R. § 1.56;

Although the Petition is complete-as-filed, USTelecom will file the confidential and highly confidential information at issue as soon as the Commission issues an appropriate protective order (or protective orders), and will not oppose giving INCOMPAS and others ample time to consider that material. Additionally, as a show of good faith, USTelecom appends to this Opposition a description of the UNE data noted in its economic analysis,⁴ an explanation of how the data were analyzed to develop allocation and averages by UNE type, and an explanation of how commercial wholesale prices used in the analyses were developed.⁵

DISCUSSION

The Petition is clear with respect to the relief it seeks and contains ample data and analysis – including a separate economic analysis prepared by two sets of experts – demonstrating that the forbearance criteria are met with respect to each of the three categories of rules for which USTelecom seeks forbearance. Moreover, USTelecom’s Petition is not the sort of “moving target” featuring “unfolding arguments and evidence” that the Commission sought to address in adopting the complete-as-filed rule.⁶ In fact, USTelecom’s Petition closely resembles

see also Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, Report and Order, 24 FCC Rcd 9543 ¶ 30 (2009) (“*Forbearance Procedures Order*”). Given the resulting ambiguity about the procedural posture of INCOMPAS’s motion, USTelecom submits this opposition pursuant to the default timeframe for motions out of an abundance of caution.

⁴ These data are aggregated to protect confidentiality, but we identify the carriers who provided UNE data, the states in which the UNEs are provided, and total counts and average prices for each of the six categories of UNEs.

⁵ These aggregated data and explanations of analysis methodology have been provided by CMA Strategy Consulting. These submissions are in compliance with the terms of an NDA signed with the companies submitting confidential or proprietary company-specific data that prohibits CMA from sharing such data. It is expected that any company-specific data the Commission deems necessary for its consideration of the Petition will be provided, under seal, once a protective order is in place.

⁶ *Forbearance Procedures Order* ¶ 12.

a previous forbearance request that the Commission found, on two occasions, was consistent “on its face” with the complete-as-filed rule, prompting the Commission to dismiss objections to the contrary.⁷

INCOMPAS does not lodge holistic complaints about the quality of USTelecom’s Petition. For example, INCOMPAS does not claim that USTelecom has not met its burden to make a *prima facie* case for forbearance,⁸ but instead complains only that certain data underlying that case has not yet been made available. In that respect, INCOMPAS targets a few discrete parts, focusing in particular on a three-page section of the thirty-three-page economic analysis appended to USTelecom’s Petition that expressly relied on confidential information provided by USTelecom members.⁹ Despite acknowledging that such material is “understandably confidential and proprietary,”¹⁰ INCOMPAS nonetheless contends that its absence from the Petition rendered USTelecom’s filing incomplete and insists that the Commission must dismiss the Petition or, “at a minimum,” order USTelecom to file all of the underlying confidential data.¹¹

But the complete-as-filed rule does not require the inclusion of confidential material and does not entitle parties to review such information absent appropriate safeguards. Rather, in adopting the rule, the Commission expressly contemplated that confidential material would be

⁷ *United States Telecom Ass’n Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order, 28 FCC Rcd 7627 ¶ 9 (2013); *USTelecom Short Order* ¶ 5 n.17.

⁸ *Forbearance Procedures Order* ¶ 17 (defining this burden to require a detailed showing of “how each of the statutory criteria are met with regard to each statutory provision or rule from which forbearance is sought”).

⁹ INCOMPAS Mot. at 1 (citing USTelecom Petition, App. B at 14-16).

¹⁰ *Id.* at 3.

¹¹ *Id.* at 3.

made available *after the initial filing*, pursuant to “any protective orders the Commission issues in the course of the proceeding.”¹² Moreover, the Commission specifically declined to amend its rules regarding the submission and disclosure of confidential information, stating that it would “continue to address on a case-by-case basis issues regarding access to proprietary data” in order “to balance the need for information against the risk of disclosure in individual circumstances.”¹³ Accordingly, in previous forbearance proceedings, the Commission routinely adopted protective orders *after* the filing of a petition in order to allow parties to then submit and/or review confidential material, and it has never deemed a petition that did not include that information from the outset to violate the complete-as-filed rule.¹⁴ Indeed, a contrary approach would present petitioners with a Hobson’s choice: either disclose highly confidential business information to competitors or forego the statutory right to seek forbearance. The complete-as-filed rule cannot be construed to that effect.

USTelecom thus requests that the Commission adhere to established practice by issuing a protective order, along with a second-level protective order for information that warrants a heightened level of protection.¹⁵ In doing so, the Commission should make clear that access to confidential and highly confidential information, including in particular company-specific data submitted in support of USTelecom’s Petition, is restricted and that company-specific data cannot be accessed or reviewed by individuals with responsibility for competitive decision-

¹² *Forbearance Procedures Order* ¶ 17.

¹³ *Id.* ¶ 39.

¹⁴ See, e.g., *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, Joint Protective Order, 29 FCC Rcd 13539 (WCB 2014).

¹⁵ INCOMPAS Mot. at 3; see also CALTEL Revised Motion for Extension of Time and for Protective Order, WC Docket No. 18-141 (filed May 15, 2018).

making.¹⁶ Such a protective order will enable USTelecom to submit confidential material in the record and to review similar information submitted by INCOMPAS, its members, or other parties, all on the same schedule that has applied in prior forbearance proceedings since the complete-as-filed rule was adopted.

INCOMPAS's further objection regarding certain data compilations contained in the Petition likewise lacks merit.¹⁷ The charts that INCOMPAS references – which were in the public domain for several months preceding the Petition's filing¹⁸ – make clear that they are derived from Commission data, which is publicly available (and is cited repeatedly in the Petition).¹⁹ It would make no sense to conclude that, by reinforcing publicly available information with additional confidential industry data and analysis, USTelecom has somehow rendered its Petition *less* complete and thus defective under applicable rules.

More broadly, the complete-as-filed rule does not require that *all* information pertinent to a forbearance request be provided in the petition itself, as INCOMPAS appears to believe. The rule is not intended to create barriers to forbearance relief, but to ensure that the process for forbearance requests is fair and efficient for all parties. The Commission has up to fifteen months to consider forbearance petitions, and during that time has asked for additional information as the key issues become more clear and arguments are crystalized. That is the

¹⁶ Due to the highly confidential nature of the company-specific data, it may be necessary to adopt a protective order similar to the protective order adopted in the *Business Data Services* proceeding, which would limit access to the data to company outside counsel and consultants.

¹⁷ INCOMPAS Mot. at 1-2 (stating that this analysis is “potentially based on publicly available sources” but that this fact is “not self-evident”).

¹⁸ USTelecom Petition at 8 n.20 (citing Patrick Brogan, *USTelecom Industry Metrics and Trends 2018*, USTELECOM, at 10 (Mar. 1, 2018), <https://www.ustelecom.org/sites/default/files/images/USTelecom%20Industry-%20Metrics%20and%20Trends%202018.pdf>).

¹⁹ See *id.* at 10 & n.21, 16 & n.45, 17 & nn.46-47.

nature of the regulatory process. For that reason, the Commission itself has sought additional data in the midst of forbearance proceedings, without suggesting that the request retroactively rendered the underlying petition incomplete.²⁰

In short, INCOMPAS's motion is without merit. USTelecom has provided substantial data and argument to support its Petition. The suggestion that INCOMPAS or others are being denied a "meaningful opportunity" to review that request in violation of the Administrative Procedure Act and due process principles is premature and unsupportable at this point in the proceeding.²¹ USTelecom has been and remains prepared to make available additional confidential and proprietary information supporting its Petition once the Commission puts appropriate safeguards in place, per standard practice in previous forbearance proceedings. That such additional supporting data was not submitted into the public record with the initial filing in no way renders the filing incomplete under the Commission's rules.

²⁰ See, e.g., *Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, Second Protective Order, 28 FCC Rcd 2082 ¶ 2 (WCB 2013) (citing Letter from Julie Veach, Wireline Competition Bureau, to Craig Brown, CenturyLink Inc., WC Docket No. 12-60, DA 13-339 (Mar. 4, 2013)); Letter from Julie Veach, Wireline Competition Bureau, to Craig Brown, CenturyLink Inc., WC Docket No. 14-9, DA 14-1324 (Sept. 12, 2014).

²¹ INCOMPAS Mot. at 2-3; see also Letter from Thomas Jones *et al.*, Counsel for Granite Telecommunications, LLC to Marlene Dortch, Secretary, FCC, WC Docket No. 18-141, at 2 (filed May 15, 2018). The allegation of APA and due process violations appears to be directed at the Commission – the cases these parties cite involve situations in which an agency (rather than a party) denied interested parties an opportunity to comment on an issue. Provided that the Commission adopts a protective order that facilitates submission and review of confidential information, these steps will further ensure opportunity for meaningful comment here.

CONCLUSION

For these reasons, the Commission should deny INCOMPAS's motion and issue a protective order that will facilitate the expeditious review of the merits of USTelecom's Petition.

Respectfully submitted,

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May 21, 2018

APPENDIX

CMA-EI approach to UNE allocation and pricing synthesis

As part of its engagement for USTelecom to conduct a commercial impact assessment of UNE forbearance, CMA requested the participating USTelecom members (Verizon, AT&T, CenturyLink, Frontier) to provide data on the current counts, locations and pricing of their UNE loops and transport circuits. The participating representatives worked with the people in their business units and IT teams that could extract the data and provided data sets with various levels of comprehensiveness. Some included pricing at the circuit level while others included circuit locations and pricing schedules by state and density zone. The data included circuits in 15 states.

The first step was to harmonize and consolidate field names into a manageable list of circuit names, which CMA consolidated into DS0 Digital Loop, DS0 Analog Loop, DS1 Loop, DS3 Loop, DS0 EEL, DS1 EEL or DS3 EEL. Cleaning out some data was necessary for certain providers, to exclude UNE-P circuits and other non-relevant products. Where provided, CMA used MRC or the pricing rate associated with each product (both directly for the circuit cost and “add-on costs” like cross-connects, mileage etc.), as stated in each ILEC’s data files. For circuit or “add-on” revenues not associated with a specific product, CMA used the assumption that “unspecified” revenues associated to loops or EELs would have the same product distribution as traceable revenues. Only two ILECs had such revenues, which accounted for less than 5% of total UNE revenues. For data files where multiple pricing rates were provided for each product (by state and by zone), CMA used the two lowest MRC zones (Zone 1 & 2, or Zone 2 & 3) to calculate a pricing rate average by product and by state, under the assumption that UNEs are more commonly deployed in areas where they are cheaper. Average mileage as provided by the ILECs was used to calculate EEL UNE pricing.

While each dataset shared with CMA differed, they all had quantities and revenues segmented by state and ILEC-specific circuit descriptions. Carrier 1 provided the total quantities of UNE at the circuit-level as well as revenues broken out by loops, cross connects, miscellaneous and other. Carrier 1 also provided CMA with the cost per mile for UNE circuits and the average mileage sold. Carrier 2 provided CMA with the data on a state level, disclosing the total units, revenues, and ARPUs for certain UNE types. Carrier 3 provided CMA with a longitudinal dataset of UNE quantities by state. Carrier 3 also provided CMA with pricing for certain UNE circuit types broken out by state and by zone. Average mileage for Extended Enhanced Link circuits were also provided. Carrier 4 provided CMA with the count of UNE loops by state and circuit type, and the associated average rate charged for each.

CMA-EI Approach to calculating wholesale commercial rates

For DS1 Loops and DS3 Loops, CMA used the average pricing from the Business Data Services data collection: \$220 for DS1s and \$1,200 for DS3s¹. To estimate other wholesale rates, CMA calculated the discounts of known retail to wholesale rates. For Loops with known retail-wholesale discounts, CMA assumed the same delta occurred for their EEL counterpart circuits. For the rest, CMA estimated the average retail-wholesale discount which was ~25% for asset-light service provider rates and ~40% for ILEC rates. These were then applied to products’ known retail rates to estimate the market-determined wholesale rate.

¹ Marc Rysman, “Empirics of Business Data Services” Revised April 2016, 19.

UNE type	Wholesale	Retail – Asset-light provider	Retail – ILEC
DS0 Analog	\$24 ²	\$34 ³	\$40 ⁴
DS0 Digital Data	\$35 ⁵	\$400 ⁶	\$500 ⁷
DS1 Data	\$220 ⁸	\$300 ⁹	\$350 ¹⁰
DS3	\$1,200 ¹¹	\$1,300 ¹²	\$2,000 ¹³
EEL DS0 Analog	\$24 ¹⁴	\$34 ¹⁵	\$40 ¹⁶
EEL DS1 Voice	\$140 ¹⁷	\$200 ¹⁸	\$233 ¹⁹
EEL DS3	\$1,475 ²⁰	\$1,600 ²¹	\$2,000 ²²

Black: sourced, Blue: calculated

² Calculated using a 40% discount from the publicly-sourced ILEC price.

³ Price data point by asset-light provider offered by Birch (“BirchNet”) <http://www.birch.com/products/birchvoice/birchnet>. Accessed Feb, 2018.

⁴ Business voice line price by averaging out Verizon and AT&T prices. <https://www.att.com/smallbusiness/explore/landline.html> and <https://www.verizonwireless.com/biz/plans/voice-data-plans/>. Accessed February 2018

⁵ The bonding of Digital DS0s to create EoC lines creates more capacity for the bonded circuit than its individual parts. As such, retail rates are much higher than wholesale prices. Instead of discounting from the retail price, CMA calculated the wholesale price by adding the average mark-up from UNE to wholesale of all other circuits (220% markup from UNE rate, which was \$11).

⁶ Ethernet over Copper price data point by Comsoc. <http://community.comsoc.org/blogs/jakegibbs/ethernet-over-copper-eoc-gains-market-traction-telcos-delay-build-out-fiber-commerce>. Accessed Feb, 2018.

⁷ Calculated using a 20% mark-up from the publicly-sourced asset-light price.

⁸ Marc Rysman, “Empirics of Business Data Services” Revised April 2016, 19.

⁹ DS1 Data price data point by Zayo. *Zayo Group Holdings, Inc. Fiscal Year 2016 Q2. Zayo Price Trends December 2015*, 6.

¹⁰ Complaint filed with the Maryland Public Service Commission by New Frontiers against Verizon, June 2017. *Complaint of New Frontiers Telecommunications, Inc. v. Verizon Maryland, LLC. Case No. 9452*, 11.

¹¹ Marc Rysman, “Empirics of Business Data Services” Revised April 2016, 19.

¹² DS3 price data point by Zayo. *Zayo Group Holdings, Inc. Fiscal Year 2016 Q2. Zayo Price Trends December 2015*, 6

¹³ DS3 price data point by TelcoIQ <http://www.telcoiq.com/>. Accessed Feb, 2018.

¹⁴ Calculated using a 40% discount from the publicly-sourced ILEC price

¹⁵ Price data point by asset-light provider offered by Birch (“BirchNet”) <http://www.birch.com/products/birchvoice/birchnet>. Accessed Feb, 2018.

¹⁶ Business voice line price by averaging out Verizon and AT&T prices. <https://www.att.com/smallbusiness/explore/landline.html> and <https://www.verizonwireless.com/biz/plans/voice-data-plans/>. Accessed February 2018

¹⁷ Calculated using a 40% discount from the publicly-sourced ILEC price

¹⁸ DS1 Voice price data point by Megapath <https://www.megapath.com/promos/t1-dataplus/> Accessed, Feb 2018

¹⁹ Calculated using a 15% mark-up from the publicly-sourced asset-light price.

²⁰ Calculated by discounting from the asset-light price. An 8% discount was used in this case because the equivalent loop (DS3) had publicly sourced data points both for wholesale and asset-light providers, and the difference was 8%. EELs (being the same product with added on costs for mileage) will logically be priced proportionally

²¹ Calculated using a 20% discount from the publicly-sourced ILEC price.

²² DS3 price data point by TelcoIQ <http://www.telcoiq.com/>. Accessed Feb, 2018.

ILEC Data provided by:

Frontier

Verizon

CenturyLink

AT&T

	List of States
1	CA
2	TX
3	WA
4	DC
5	DE
6	MA
7	MD
8	NJ
9	NY
10	PA
11	RI
12	VA
13	CO
14	MN
15	NV

Aggregate UNE Data		
Type	Quantity	Price
DS0 Analog	433,873	\$11.23
DS0 Digital	447,858	\$11.08
DS1	45,591	\$69.24
DS3	50	\$780.59
EEL DS0 Analog	1,916	\$14.69
EEL DS1	49,891	\$119.22
EEL DS3	26	\$1,394.94
Total	979,205	

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I, Diane Griffin Holland, served the foregoing document on the following parties via e-mail:

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